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August 21, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas
Commission Secretary
Federal Communications Commission
Portals II
445 Twelfth Street, S.W., Suite TW-A325
Washington, D.C. 20554

Re: IB Docket No. 00-106 – Comments of Level 3 Communications, Inc.

Dear Secretary Salas:

On behalf of Level 3 Communications, Inc. ("Level 3"), enclosed please find an original and four (4) copies of Level 3's Comments in the above-referenced docket. Copies of Level 3's Comments are being concurrently filed on diskette with Elizabeth Nightingale of the Telecommunications Division, International Bureau and International Transcription Services ("ITS").

Please date-stamp and return the enclosed extra copy. Should you have any questions with respect to this matter, please do not hesitate to call Heather Thomas at (202) 295-8393.

Respectfully submitted,

Troy F. Tanner
Heather A. Thomas

Counsel for Level 3 Communications, Inc.

Enclosure

cc: Patricia Paoletta (Level 3)
William P. Hunt, III (Level 3)

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Commission Consideration	)	IB Docket No. 00-106
of Applications under the Cable Landing	)	
License Act	)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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Dated: August 21, 2000

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EXECUTIVE SUMMARY

Level 3 Communications, Inc. ("Level 3") supports the Federal Communications Commission's ("Commission") efforts to streamline the submarine cable landing licensing process. Streamlining is necessary to meet the increasing demand for capacity on cables that has resulted from the rapid pace of technological development. However, the Commission's proposals do not reflect the realities of the evolving cable market and represent a step back. The proposals are more onerous than the current rules, thereby creating regulatory burdens for new applicants, as well as increasing administrative burdens on the Commission. Furthermore, the proposals do not support U.S. companies in the cable market, and favor individual applicants over joint applicants.

For these reasons, Level 3 recommends a more streamlined approach to the licensing process that will fulfill the pro-competitive, non-discriminatory goals of the Telecommunications Act of 1996 ("1996 Act"). Level 3 reiterates its suggestion that the Commission look to the internationally accepted principles found in the WTO General Agreement on Trade in Services ("GATS"). These are based on both the GATS Telecommunications Annex and the Reference Paper to the Fourth Protocol. The Annex guarantees service providers in liberalized sectors non-discriminatory access to and use of the public telecommunications network, which includes, in most telecom markets, backhaul facilities. The Reference Paper calls for interconnection on an *unbundled, non-discriminatory, cost-oriented and transparent basis, at any technically feasible* point in the network. The Reference Paper also calls for public availability of licensing criteria and application of competitive safeguards when necessary to prevent anticompetitive conduct of

major suppliers.[1] These principles are as important in the submarine cable context as in any other subset of the telecommunications market.

In order to encourage other national regulators to implement these WTO-based principles, the Commission should adopt application procedures that remove the more burdensome filing requirements and expedite the entire process. The Commission's proposed three streamlining options are too unwieldy and will not result in faster licensing. The first test, a demonstration that the route on which the cable would operate is or will become competitive, does not capture enough competitive routes and will be difficult to implement. The second test, a demonstration of sufficient independence of control of the cable from control of existing capacity on the route, is static and fails to recognize that providers are encouraged to develop new cable systems by sharing the business risks associated of a new cable. The third test, evidence of pro-competitive arrangements, puts an unwarranted and unnecessarily large burden on applicants.

Accordingly, Level 3 proposes an alternative. Level 3 believes that the regulatory approach most conducive to handling the rapid development of a competitive market is one that facilitates entry and maintains safeguards against anticompetitive conduct. As such, Level 3 suggests that the submarine cable landing license procedure be simple, non-discriminatory, and reflect the realities of the marketplace. With these fundamental premises in mind, Level 3 recommends the following:

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[1] A "major supplier," as used in Level 3's comments, is a major supplier of telecommunications services as defined in the WTO Reference Paper, *i.e.*, "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." *See Fourth Protocol to the General Agreement on Trade in Services (WTO 1997)*, 36 I.L.M. 354, 367 (1997).

- The Commission adopt an application procedure conducive to a form format.
- The Commission rely on certifications by the applicant, instead of requiring supporting documentation from applicants.
- Requirements and certifications focus on matters within the applicant's control, not the control of a foreign government (such as foreign backhaul and landing rights) or non-affiliated foreign provider.
- The Commission improve its transparency on placing conditions on licenses. The Commission could place the conditions in a rule much as it does now for Section 214 authorizations.
- The licensing procedure should not favor one form of applicant over another, *i.e.*, individual versus joint applicants.
- If the Commission streamlines its review process, it should review its licensing and regulatory fees on submarine cable license applications to reflect the new cost of regulation.

The Commission proposes to treat the review of cable landing license applications similar to Section 214 applications. Level 3, however, suggests a more wholesale adoption of the Section 214 procedure. Level 3 reiterates that if an applicant qualifies for streamlined processing, its application should be granted twenty-one (21) days after it is placed on public notice. Further, Level 3 reiterates that even if the application does not qualify for streamlined treatment, the Commission should take action within ninety (90) days, as it does for Section 214 applications.

Furthermore, Level 3 encourages the Commission to coordinate with the Executive Branch to identify a more expeditious process for obtaining its approval. The Commission should consult with the Executive branch to establish a streamlined 2-week procedure for obtaining its approval. Also, automatic approval of the Executive Branch should be assumed in fourteen (14) days, unless serious prior objections are raised and supported on the record. Level

3 also reiterates its proposal that the Commission automatically grant a streamlined application, even if oppositions are filed, unless the Commission staff independently determines that the application raises extraordinary issues. In the alternative, Level 3 supports the Commission's proposal to issue conditional grants and also supports the proposed procedures regarding ways in which it can accelerate the applicable review process independent of the Executive Branch.

Level 3 reiterates that the Commission should create meaningful categories of licensing conditions that can be applied based on market conditions at the foreign end of the cable and in the United States, and on the ownership structure of the cable system. Instead of having common carrier and non-common carrier cables, with all of the regulatory baggage that comes with those terms, there could be categories such as streamlined systems and market-structure conditioned systems. Also, the Commission should only require U.S. landing parties to be licensees for cable landing licenses. In the same vein, Level 3 reiterates its suggestion that the Commission eliminate the requirement for prior approval to add new, non-landing parties.

Finally, the Commission should work to prevent foreign carriers from acting anticompetitively in the submarine cable market. While some markets are more competitive than others and have authorized Level 3 to construct its own cable station and backhaul, many markets have build and service restrictions in place favoring incumbent carriers. Level 3 does not support the Commission putting restrictions on U.S. carriers desiring to build cable systems to these markets. The Commission should avoid placing restrictions on U.S. carriers as to what terms they may negotiate with a foreign carrier, or failure to accept such terms will prevent the carrier from building a cable system to a less competitive market. Instead, the Commission should be supporting U.S. carriers seeking to expand international cable capacity to these markets by quickly processing their

license applications. Concurrently, the Commission should work with foreign regulators to pursue the opening of their cable markets. For example, competing carriers should have access to cable stations and backhaul controlled by major suppliers. They should be able to build or access competitive backhaul services from these cable stations. Competing carriers should also be able to cross-connect to other cable systems.

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COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (Level 3) files these Comments regarding the Federal Communications Commission's ("FCC" or "Commission") review of its licensing procedures for applications under the Cable Landing License Act.[2]

I. INTRODUCTION

The telecommunications industry is rapidly changing. Among those changes is the manner in which submarine cable systems are planned, built and operated. New generations of submarine technology can be deployed every 12 months. The next technology surge could enable the new applicants to leapfrog existing providers. A licensing process premised on a static view of the market is obsolete, and threatens the competitiveness of the U.S. submarine cable industry. The Commission's traditional method of regulating these systems must change in order to enable U.S. businesses and consumers to meet the challenges of the New Economy. Therefore, Level 3 supports the Commission's review of its regulatory framework regarding the licensing of submarine cables landing in the United States.

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[2] *In the Matter of Review of Commission Consideration of Applications Under The Cable Landing License Act*, IB Docket No. 00-106, Notice of Proposed Rulemaking, rel. June 22, 2000.

Level 3 endorses the Commission's view that streamlining measures are required to accommodate the explosive increase in demand for both inbound and outbound international capacity that has resulted from the rapid pace of technological development generally, and from the United States' key position in the development of the global information infrastructure in particular. However, Level 3 is concerned by the Commission's specific proposals for reform, which would impose tests that only exacerbate, rather than relieve bottlenecks in the license approval process. This is because applicants satisfying the "streamlining" criteria would need to submit highly complex and route-specific information that would require similarly complex and individual analyses by the Commission. In other words, the process of satisfying the streamlining criteria would demand resources and effect delays that would undermine the objectives of the streamlining process.

In addition, the Commission's proposals do not reflect the dynamics of cable system investment; they do not support U.S. companies attempting to compete in the cable market; and they would not operate in an equitable manner. For instance, we believe that the proposed rules could, in many cases, inappropriately place the burden of opening foreign markets on the shoulders of U.S. carriers and others seeking to challenge monopolies, even where such carriers have no control over the competitiveness of the regime on the foreign end. Further, the proposed application process unjustifiably favors individual over joint applicants, when the realities of the marketplace are that ownership of cables will change on a regular basis regardless of the identity of the original applicant. Finally, the proposals are more onerous than the current rules, thereby creating regulatory burdens for new applicants, as well as increasing administrative burdens on the FCC. Because they are complex, the proposals would create too many opportunities for

competitors to slow down applications, to no other end but regulatory arbitrage. The more complex a regulation, the more it can be abused by a competitor.

Level 3 recommends a more streamlined approach to the submarine cable landing licensing process that will fulfill the pro-competitive, non-discriminatory goals of the 1996 Act. A less burdensome process also will be consistent with the Commission's goal of increasing competition in the international submarine cable marketplace. Level 3 suggests, as it did in its initial Comments, that the Commission refer to the internationally accepted principles found in the WTO GATS.[3] These principles are found in both the GATS Telecommunications Annex and the Reference Paper to the Fourth Protocol[4] ("WTO Agreement"). The Annex guarantees service providers in liberalized sectors non-discriminatory access to and use of the public telecommunications network, which in most telecom markets includes backhaul facilities. The Reference Paper calls for interconnection with a major supplier's network on an unbundled, non-discriminatory, cost-oriented and transparent basis, at any technically feasible point in the network. The Reference Paper also calls for public availability of licensing criteria and application of competitive safeguards when necessary to prevent anticompetitive conduct by major suppliers. The Annex and Reference Paper apply to submarine cable facilities and cable landing stations in countries that made market-opening commitments, unless they excluded such

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[3] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 2* (GATT Secretariat 1994), 33 I.L.M. 1125 (1994).

[4] *See Fourth Protocol to the General Agreement on Trade in Services* (WTO 1997), 36 I.L.M. 354 (1997).

cable facilities.[5] These WTO-based principles are as important in the submarine cable sector as in any other subset of the telecommunications market. They are critical if regulators wish to encourage next-generation submarine systems.

Accordingly, in order to encourage other national regulators to implement these WTO-based principles, the Commission should adopt application procedures that remove burdensome filing requirements, and expedite the entire process. Level 3 recommends that:

- The Commission adopt an application procedure that relies on certifications of applicants, instead of supporting documentation.
- The Commission target its conditions to prohibit actual anticompetitive practices.
- The Commission expedite review of applications.
- The Commission coordinate with the Executive Branch to identify ways to open closed markets.
- The Commission eliminate the common carrier/non-common carrier distinction.
- The Commission only require U.S. landing parties to be licensees for cable landing licenses.

In sum, Level 3 proposes a regulatory framework that promotes the rapid provisioning of needed information infrastructure, expedites competitive entry, minimizes administrative burdens, and discourages anticompetitive conduct by major suppliers in overseas markets. The most efficient way to encourage other governments to open their markets is to expeditiously license U.S. next-generation submarine cable providers. The promise of international broadband capacity will be the most effective inducement for market opening in many of the world's currently underserved markets that lack adequate Internet connectivity and low-cost bandwidth.

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[5] The Reference Paper is only binding on those countries that specifically agreed to adopt it as part of their market-opening commitments.

II. THE FCC SHOULD ADOPT A LESS BURDENSOME APPLICATION PROCESS THAT CAPTURES POTENTIAL COMPETITION PROBLEMS

The NPRM proposes that an applicant for a submarine cable landing license demonstrate that its application conforms with one of three streamlining options: (1) a demonstration that the route on which the cable would operate is or will become competitive; (2) a demonstration of sufficient independence of control of the cable from control of existing capacity on the route; and (3) evidence of pro-competitive arrangements. These three tests are too unwieldy, and will not result in faster licensing. There are less burdensome ways for the Commission to address legitimate competition concerns. Below, Level 3 addresses the problems of each test and proposes a less burdensome application process that captures potential competition problems.

A. The Competitive Route Test Will Be Difficult to Implement

The competitive route test requires a demonstration that the route is, or will become, competitive due to the presence of multiple, independently controlled cables. Level 3 endorses the concept that less regulation is necessary when there is competition for supply services. The concern with this option, however, is that the number of cable systems operating on a particular route is not a reliable indicator of the competitiveness of supply conditions. In our view, a more accurate assessment would examine the number of independent facilities-based investors on these routes (there may be more than one per cable system); the degree of vertical integration between these investors and domestic services and facilities in destination markets; and the actual extent of effective competition in those markets. But these factors should be considered in the context of a received application, rather than form the basis of an inflexible test that can be manipulated by competitors to the immediate applicant(s).

Under the terms of investment in cable systems in which Level 3 commissions or participates in, co-investors compete openly with one another in the destination markets. A cable system with, for example, six operators each owning and controlling a fiber pair each would represent the addition of six independent, facilities-based competitors to the route. As such, we would strongly argue that such a route would become competitive even if it were the second cable system on the route. In this event, the existence of a 3-cable minimum would not only be unjustified, it would also operate to unfairly penalize pioneers of former monopoly routes, in favor of later investors. We believe this outcome would be inconsistent with the intended pro-competitive effect of these reforms.

Furthermore, there are problems with defining an "independently controlled cable." Because of the lack of clarity with this definition, applicants will be uncertain whether their application meets the test. Moreover, determining whether a cable has been operational within 36 months of the application and determining whether sufficient competition exists on a route to allow for streamlined review would be difficult for the applicant to assess.

Each element of the test is open to manipulation by applicants and dispute by competitors. It is difficult to establish a brightline test for what is considered an "independently controlled cable." Whatever identifying factors are chosen become irrelevant as new cable ownership structures are implemented. Likewise, it will be difficult to identify "routes" for cables that have multiple landings, built in different stages, with varying ownership structures on each segment. Finally, identifying a starting operational date for a cable can be open to contest because spurs of the system may become operational at different times, and owners, for strategic reasons, may not publicly announce the effective starting date. Demonstrating this element

would therefore prove burdensome. Applicants will be forced to ascertain information from competitors as to operational dates of competing systems. This is particularly problematic with the prevalence of non-disclosure agreements.

As an alternative, Level 3 supports adoption of a system where the Commission identifies presumptively competitive routes and types of cable systems and, therefore, any cable system on the route would be eligible for streamlined processing. For instance, the Commission could find all routes to WTO member countries that have made full open market access commitments would be eligible for streamlined processing. This would place the burden on a competitor to show that the route was not competitive and reduce frivolous challenges from competitors. The Commission should publish an inquiry and solicit comment from industry as to which markets maintain restrictions on backhaul, landing station construction and operation, landing permits, sale of capacity to classes of users, and full competition with the incumbent telecommunications operator.

B. The Competitive Capacity Expansion Test Is Static

The Commission's second "streamlining" option requires applicants to demonstrate that the proposed system will be controlled predominantly by new entrants. Level 3 believes that this test fails too because it is burdensome and static. Well intended, the test does not reflect the realities of the cable market. The test presumes to favor single owner cables, but fails to recognize that providers are encouraged to develop new cable systems by the ability to share the high-cost and business risk of a new cable. Once licensed, cable owners typically sell capacity and bring new owners onto the system to spread business risk. This practice actually facilitates the entry on a route of more competitors, both new and existing. Therefore, although an initial

application might include only "new entrants," it could ultimately be owned by carriers that would not have been considered "new entrants" at the time of licensing. Further, the test does not recognize the competitiveness of consortium cables which are competitive in terms of facilitating smaller providers selling capacity, especially on the wet portion.

Another problem with this test is that it penalizes new entrants that bring high-capacity state-of-the-art cable systems to market. Because of the technology surges achieved in submarine optonics, a new entrant could be considered "dominant" because it would control more than 50% of the capacity on a route once its cable becomes operational. In addition, that provider would then be precluded from streamlined processing for a second cable on the same route. As proposed, the test would drive U.S. providers away from serving "thin routes" or other underserved routes, inconsistent with this Administration's stated policy goals.

Level 3 does not support the alternative test proposed by Global Crossing. Under the proposal, applicants must demonstrate that the landing parties on the U.S. end of the cable do not have a combined share of more than 35% of the active half circuits, including half circuits of full circuits, on the U.S. end of the cable. Global Crossing also proposes to provide an exemption for "thin routes." Level 3 emphasizes that obtaining information from parties on the U.S. end of the cable will prove to be time consuming and burdensome. Also, identifying "thin routes" is a difficult and complicated process. Furthermore, requiring such additional information will increase administrative burdens on the Commission. A 35% cap test will ultimately disincent next generation cable providers from deploying high-capacity systems because such higher capacity cable will quickly become embroiled in non-streamlined review. Furthermore, the 35%

cap test, since it will slow the deployment of next-generation broadband cable systems, will actually undermine the Commission's goal of encouraging market opening abroad.

C. The Pro-Competitive Arrangements Test Is Overly Burdensome and Ignores The Realities of the Marketplace

The Commission's third option requires a demonstration from applicants of sufficient pro-competitive arrangements. The Commission proposes two tests:

> (1) Arrangements Regarding Landing Stations and Competitive Backhaul -- The Commission's proposed test requires Applicants to include, in ownership and other documents, general provisions allowing for sufficient collocation at a landing station by other owners or their designees and stating that there will be no restrictions on who can provide backhaul. Applicants might be required to make more specific demonstrations, such as (1) the availability to owners of sufficient space at all landing stations in the United States, and at each foreign landing station, to collocate equipment to provide backhaul; (2) the right for all owners to use such space for the provision of backhaul services to others; and (3) the absence of restrictions on the ability of any owner to subcontract the provision of backhaul. The Commission has also suggested that applicants explicitly state that at least two separate parties will provide backhaul, rather than a single entity.
>
> Arrangements Regarding Capacity Upgrades and Use of Capacity -- The Commission's proposed test requires an applicant to include provisions that would allow the capacity of a cable to be upgraded either by a 51 % vote of the owners or by any group of owners voting to fund the cost of the upgrade. In the latter case, all owners should have the right to buy into the upgrade. An applicant should include provisions explicitly stating that, after the initial capacity has been funded, there will be no restrictions on resale or transfer of capacity and no restrictions on parties reselling their ownership shares and/or reselling or leasing their rights on the cable.

Both proposals put an unwarranted and unnecessarily large burden on applicants. The Commission can accomplish its goal without placing such demands on applicants. The Commission should place a stronger emphasis on preventing anti-competitive practices through the imposition of post-entry licensing conditions. These conditions should focus on the activities of the cable owners--those that have the ability to correct abuses in the marketplace. The

Commission should not impose restrictions regarding foreign backhaul rights on those who lack the ability to control those backhaul rights. Therefore, conditions should be limited only to those areas that applicants control.

D. Level 3 Proposed Application Format

The regulatory approach most conducive to handling the rapid development of a competitive market is one that facilitates entry and maintains effective safeguards against anticompetitive conduct. As such, Level 3 suggests that the submarine cable landing license procedure be simple, non-discriminatory, and reflect the realities of the marketplace. With these fundamental premises in mind, Level 3 recommends the following:

- The Commission develop an application procedure conducive to a form format.
- The Commission rely on certifications by the applicant, instead of requiring supporting documentation from applicants.
- Requirements and certifications focus on matters within the applicant's control, not the control of a foreign government (such as foreign backhaul and landing rights) or non-affiliated foreign provider.
- The Commission improve its transparency on placing conditions on licenses. First, standard conditions on the operation of submarine cables, should be publicly available. The Commission could place the conditions in a rule much as it does now for Section 214 authorizations.[6] For example, clear standards should be established as to when a submarine cable will be subject to more stringent regulation because of an owner's affiliation or exclusive arrangements with a foreign provider with market power. These standards should focus on the historical benefits of incumbency relating to the particular owner, arrangements with the major supplier on the terminating end, and on the legal ability of other carriers to build competing cable systems on the route.[7]

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6 *See* 47 C.F.R. § 63.21-23.

7 Where, for example, a landing party at the destination end of the system holds monopoly or semi-monopoly landing rights, competing cables may be delayed, impeded, or even foreclosed.

- The licensing procedure should not favor one form of applicant over another, *i.e.*, individual versus joint applicants. The high cost of deploying submarine cables will ensure multiple ownership, whether on an original ownership basis or on an Indefeasible Rights of Use ("IRUs") basis. An application process that favors one over another does not reflect the realities of the marketplace, especially in light of the fact that ownership of a cable changes on a regular basis as capacity is bought and sold.

- If the Commission streamlines its review process, it should review its licensing and regulatory fees on submarine cable license applications to reflect the new cost of regulation.

III. STREAMLINING METHODS

A. The Commission Should Expedite Review of Applications

In the NPRM, the Commission proposes to treat the review of cable landing license applications similar to Section 214 applications. Level 3, however, suggests a more wholesale adoption of the Section 214 procedure.[8] For example, the Commission proposes that, if an application qualifies presumptively for streamlined review, the Commission will grant the application sixty (60) days from the date the International Bureau issues a public notice accepting the application for filing, or indicate in a public notice why grant of the application within sixty (60) days cannot be provided. Level 3 reiterates its proposal that if an applicant qualifies for streamlined processing, its application should be granted twenty-one (21) days after it is placed on public notice. Because the Commission grants Section 214 applicants on a streamlined basis fourteen (14) days after the date of public notice listing the application as accepted for filing,[9] there is no reason to wait sixty (60) days to grant an application. Further, Level 3 reiterates that

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8 *See* 47 C.F.R. § 63.18.

9 *See* 47 C.F.R. § 63.12.

even if the application does not qualify for a streamlined treatment, the Commission should take action within ninety (90) days, as it does for Section 214 applications.

B. The Commission Should Coordinate With The Executive Branch To Identify Expedited Procedures for Approval

Level 3 encourages the Commission to coordinate with the Executive Branch to implement a more expeditious method for obtaining its approval. Multiple levels of review at the Commission and other Executive Branch agencies create delays and uncertainties in the licensing process. No other type of telecommunications facility licensed by the Commission requires such involved Executive Branch review. As noted in its initial Comments, Level 3 does not believe that there is anything unique about submarine cables that warrants such increased scrutiny by the Executive Branch. Level 3 reiterates its suggestion that the Commission work with the Executive Branch to expedite its review of cable applications. The Commission should consult with the Executive Branch to establish a streamlined 2-week procedure for obtaining its approval. Also, automatic approval of the Executive Branch should be assumed in fourteen (14) days, unless prior objections are raised and supported on the record.

Level 3 also reiterates its proposal that the Commission automatically grant a streamlined application, even if oppositions are filed, unless the Commission staff independently determines that the application raises extraordinary issues. As in the streamlined Section 214 process, when the Commission determines that an application qualifies for streamlining it has already passed upon the merits of the application. The only development that should remove the application from streamlining should be new evidence that grant of the application would raise national security or significant anticompetitive concerns that cannot be resolved through the standard

conditions already in place.

In the alternative, Level 3 supports the Commission's proposal to issue conditional grants whereby it would condition its grant of authority on ultimate approval by the State Department. But even in such instances, the Commission should coordinate with the State Department on an outside time limit by which the Department will respond, in order to give stability and predictability to the process.

Level 3 also supports the proposals accelerating the applicable review process independent of the Executive Branch (*i.e.,* issuing the licenses by Public Notice, rather than by issuing an order, as it does under the Section 214 streamlining process). Further, Level 3 supports the use of electronic filing, but stresses to the Commission the importance of simplifying the application process so it is more conducive to a form format. Otherwise it will be very difficult to file an application electronically under the rules as proposed.

IV. THE COMMISSION SHOULD ELIMINATE THE COMMON CARRIER/NON-COMMON CARRIER DISTINCTION

Level 3 does not support the Commission's decision to maintain a distinction between common carrier and non-common carrier submarine cable systems. This distinction can be confusing because under the Commission's licensing scheme, some carriers are required to be licensed as telecommunications services providers, *i.e.*, get Section 214 authority to get a cable landing license, whereas other carriers are not subject to the same requirements. Level 3 notes that the Cable Landing License Act, 47 U.S.C. §§ 34-39, makes no distinctions between common carrier and non-common carrier licenses. In addition, the legal distinction between common carrier and non-common carrier submarine cable systems is vague. Many submarine cable

systems today are a hybrid of the old consortium model and the private systems model and therefore do not easily fit into the common carrier or non-common carrier category. The distinction is an artifact of the former facilities planning process that was in place when the first private systems were licensed, and systems' costs formed part of a carrier's regulated, rate-of-return base.

Level 3 reiterates that the Commission should create meaningful categories of licensing conditions that can be applied based on market conditions at the foreign end of the cable and in the United States, and on the ownership structure of the cable system. Instead of having common carrier and non-common carrier cables, with the distortions that come with those terms, there could be categories such as streamlined systems and market-structure conditioned systems.

IV. THE COMMISSION SHOULD WORK TO PREVENT FOREIGN CARRIERS FROM ACTING ANTICOMPETITIVELY IN THE SUBMARINE CABLE MARKET

As Level 3 has built out its international network, it has encountered a variety of regulatory regimes. While some markets are more competitive than others, including authorizing Level 3 to construct its own cable station and backhaul, many markets have build and service provision restrictions in place favoring the incumbent carriers. Despite these limits Level 3 does not support the Commission putting restrictions on U.S. carriers desiring to build cable systems to these markets. The Commission should avoid placing restrictions on U.S. carriers as to what terms they may negotiate with a foreign carrier, especially when those terms might not be within the control of the U.S. carrier, or failure to accept such terms will prevent the carrier from building a cable system to a less competitive market. Instead, the Commission should be doing all within its power to support U.S. carriers seeking to expand international cable capacity to

these markets.

Level 3 believes there are problems in many markets that the Commission should be aware of and should be taking steps to address. These steps, however, should not burden U.S. carriers desiring to build cable systems to these markets. Instead, the Commission should be actively working through the bilateral regulator-to-regulator dialogue process, or through Administration-led trade and policy fora, to address these practices. Below are some of the practices the Commission should be seeking to address with the appropriate bilateral actions.

C. Cable Station Access

Competing carriers should be allowed to physically collocate at the cable station of a foreign major supplier and use their own multiplexing equipment. If it is necessary to use equipment, such as DACS equipment, owned by the incumbent major supplier carrier at its cable station, access should be given on a reasonable, timely, and non-discriminatory basis (at the same prices the cable station owner charges itself). Alternatively, new carriers should be able to access the cable head on nondiscriminatory and reasonable terms and conditions. To ensure this, circuit provisioning and interconnection intervals must be established. Carriers must be able to use their own multiplexing equipment and must not be forced to pay to use the cable station owners' equipment in order to interconnect their backhaul at the cable head. If such interconnection imposes additional costs on the operator, the party obtaining the special access should reimburse only those direct costs. In addition, the cable station owner that is a foreign major supplier should provide transparency into the cost allocation at the cable station, showing clearly how its domestic and international cable facilities, including backhaul, are separated and separately priced.

D. Backhaul

A competing carrier should be able to build its own backhaul facilities, or negotiate a backhaul contract with a foreign major supplier on a timely and reasonable basis, with non-discriminatory pricing, equivalent to what the provider of backhaul charges itself or an affiliate. Times for activation of backhaul capacity should be reasonable and accomplished using the same timing and terms and conditions that apply to the major supplier that is self-provisioning its backhaul. Foreign major suppliers should not be able to have exclusive right-of-ways, but should be required to share these right-of-ways. More preferably, new entrants should be granted rights-of-way by local foreign government for their own use. Moreover, all capacity, including terrestrial backhaul facilities, should be made available in units that reasonably accommodate new entrants' needs. These factors, critical for competitive entry, are incorporated in the WTO Reference Paper, which most governments in important markets adopted. In cases where all of the capacity is sold on a city-to-city basis, these backhaul conditions would not be relevant.

E. Additional Procedural Requirements

Foreign major suppliers should also be subject to certain procedural requirements at home, which will ensure that competitors have access to bottleneck facilities. They should be required to consistently honor requests to expedite orders for service, and the standard lead times should be reasonable. A foreign major supplier's expedite charges also should be reasonable, and include a guarantee that the deadline will be met. In addition, information about pricing and availability for IRUs, terrestrial backhaul, and cable maintenance and restoration should be freely available to prospective purchasers. In this vein, any volume/term discounts offered by a foreign major supplier should be reasonable and cost-justified. Finally, if a cable system can be

technically upgraded, but the foreign major suppliers participating on the system refuse to allow the upgrade, then those carriers should be required to sell any of their unused capacity to the new entrants.

VI. THE COMMISSION SHOULD ONLY REQUIRE U.S. LANDING PARTIES[10] TO BE LICENSEES FOR CABLE LANDING LICENSES

Regarding the FCC's proposal that an entity having a 5% or greater ownership interest in a proposed cable must be included as an applicant, the Commission should only require U.S. landing parties to be licensees for cable landing licenses. As noted in its initial Comments, Level 3 believes that in large consortium cables, it is no longer useful to require all carriers with ownership interests to be co-applicants. Non-landing parties generally tend to be small U.S. and WTO member country[11] carriers with little market power and a non-controlling interest in the consortium.[12] As the Commission acknowledged, such non-landing carriers are rarely in a position to deter the construction of additional capacity -- a central focus of the Commission's

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10 "Landing parties" are those which possess actual control over cable landing stations.

11 The Commission has noted that "carriers from WTO member countries would rarely be able to harm competition in the U.S. market by acting anticompetitively." *See In the Matter of AT&T Corp et al. Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No. SCL-LIC-19981117-00025, Cable Landing License, FCC 99-167, at ¶ 20 (rel. July 9, 1999) ("JUS Order").

12 The recent application for the Japan-U.S. Cable Network included thirty-two (32) parties; however only five (5) of the applicants, AT&T Corp., Japan Telecom, KDD Corporation, MCI WorldCom and NTT are to operate landing stations, and only AT&T and MCI WorldCom are to operate them in the United States. *See* AT&T Corp. *et al.*, Joint Application for a License to Land and Operate a Submarine Network Between the United States and Japan, File No. SCL-LIC-19981117-00025, filed Nov. 17, 1998. Not surprisingly, these landing parties possess the largest voting interests in the consortium.

cable landing license public interest analysis.[13] Landing parties, on the other hand, which may control bottleneck facilities, such as cable landing stations, potentially possess the power and incentive to act anti-competitively by charging monopoly rents and ultimately discouraging additional capacity from being constructed.[14] Therefore, in order to ensure that licenses are processed in an expeditious manner while also ensuring that the public interest is protected, the Commission should limit the licensing requirements to U.S. landing parties only.

In the same vein, Level 3 reiterates its suggestion that the Commission eliminate the requirement for prior approval to add new, non-landing parties. Therefore, Level 3 does not support the Commission's proposal to require modification of a license to add an initial foreign-end owner that desires to now operate an end-to-end service to the United States. The only exception would be if the foreign owner was a landing party.

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13 See JUS Order at ¶ 25.

14 *Id.* at ¶ 32.

VII. CONCLUSION

WHEREFORE, Level 3 Communications, Inc. recommends that the Commission further refine the submarine cable landing license application process so as to remove the more burdensome filing requirements, and expedite the entire process. Such efforts will help the Commission achieve its goal of encouraging facilities-based competition in the international submarine cable industry, which will result in increased innovation and lower prices for consumers.

Respectfully submitted,

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Dated: August 21, 2000